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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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ANDREA TANTAROS,

Petitioner,

v.

19 Cv. 7131 (ALC)

FOX NEWS CHANNEL, LLC, et al.,

Respondents.

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New York, N.Y.
November 19, 2019
3:00 p.m.

Before:

HON. ANDREW L. CARTER, JR.,

District Judge

APPEARANCES

FEIN & DELVALLE PLLC
Attorneys for Petitioner

BY: BRUCE FEIN

-and-

WOLF HALDENSTEIN ADLER FREEMAN & HERZ

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Attorneys for Respondent William Shine

BY: MARION J. BACHRACH

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(Case called)

THE DEPUTY CLERK: Counsel, please state your appearance.

For the petitioner.

MR. FEIN: Good afternoon, your Honor. Bruce Fein. I am representing petitioner, Andrea Tantaros. She is in the first row in the gallery.

MS. BASAR: Your Honor, good afternoon. Demet Basar, from Wolf Haldenstein, local counsel for petitioner.

MR. TEPPER: Good afternoon, your Honor Daniel Tepper, from Wolf Haldenstein, local counsel for petitioner.

THE DEPUTY CLERK: For the respondents.

MR. LAMPE: Good afternoon, your Honor. Matt Lampe, from Jones Day, for respondents Fox News Network, Suzanne Scott, Dianne Brandi, and Irena Briganti.

MS. YOST: Good afternoon, your Honor. Kristina Yost, also with Jones Day, for respondents Fox News Network LLC, Dianne Brandi, Irena Briganti, and Suzanne Scott.

MS. BACHRACH: Good afternoon, your Honor. Marion Bachrach for counterclaim respondent William Shine.

MS. CARSON: Good afternoon, your Honor. Kimberly Carson, Quinn Emanuel, for respondent The Estate of Roger Ailes. Also with me in the courtroom is my colleague Brendan Carroll.

THE COURT: OK. In my order I have instructed the

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1 parties that I would give them certain time limits for oral
2 argument, 15 minutes for the opening argument and seven minutes
3 for rebuttal. Since this is a motion to remand, we will start
4 with the plaintiffs and then we will move on to the defendants.

5 Go ahead, counsel.

6 MR. FEIN: Would you like me to speak from the podium?

7 THE COURT: As long as you use a microphone it doesn't
8 matter to me. You can sit there or use the podium. The
9 acoustics here aren't great so make sure you use the mic.

10 MR. FEIN: Your Honor, we begin, I believe, with a
11 very heavy burden on the respondents to demonstrate that this
12 particular case is one of those extremely rare cases, whereby
13 the plaintiff's well-pleaded complaint arising under state law
14 is treated as a federal question nonetheless. And extremely
15 rare, your Honor, were the words used by Chief Justice John
16 Roberts in *Gunn v. Minton*, a decision unanimously subscribed to
17 by the United States Supreme Court.

18 You asked us to address first the four criteria of
19 *Gunn v. Minton* that the chief justice set forth for departing
20 from the well-pleaded complaint rule. We submit that three of
21 the four criteria are clearly not met.

22 The first criteria is that a federal issue is
23 necessarily implicated in the state cause of action alleged by
24 the plaintiff. We alleged a claim arising exclusively under
25 state law, Section 7515, that prohibits mandatory arbitration

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1 for sexual harassment claims and allegations. Then, moreover,
2 the underlying claims and allegations arise exclusively under
3 state law as well, state human rights laws prohibiting sexual
4 harassment, sexual abuse and retaliation in the workplace.

5 And there is no reason, given the canon of statutory
6 construction, that exceptions to a rule are to be pleaded and
7 argued and proved by the defendant; they are not part of the
8 plaintiff's case. That is a standard of statutory construction
9 that the Supreme Court has repeatedly embraced. And in this
10 case, the statutory language is, except when inconsistent with
11 the federal law, then the rule applies. And reading that
12 statutory language it means the defendant has to allege a
13 defense under federal law.

14 It would be impractical to have the rule otherwise,
15 your Honor. A plaintiff cannot know all the federal corpus of
16 laws, regulations, rules, every court decision, and say, well,
17 I know my state law claim is not inconsistent with any of those
18 kind of claims. The complaint would be hundreds of pages long.
19 Moreover, to think that the New York Legislature enacted this
20 statute as a remedial measure, it would be odd to interpret it
21 to impose this very, very heavy burden on the plaintiff to
22 allege, I suppose on information and belief, there is no
23 federal law anywhere that's inconsistent with my 7515 claim.

24 So we believe that there is no argument that there can
25 be a federal issue implicated in the plaintiff's well-pleaded

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1 complaint which arises exclusively under state law. The
2 federal issue arises only as a defense, a defense of
3 preemption, and the law is quite clear, a federal preemption
4 defense does not make a state law claim a federal question for
5 jurisdictional purposes.

6 The second issue we believe that cannot be satisfied
7 by the respondents is the requirement that the federal issue be
8 substantial, namely, that it would have a huge system-wide
9 impact on the administration of the Federal Aviation Act. The
10 respondents themselves characterize this particular removal as
11 very unique, virtually never happens. Moreover, the 7515
12 statute applies only to a microscopic portion of all claims
13 that may be arbitrable under the FAA.

14 THE COURT: I am sorry to interrupt you. Just to be
15 clear for the record, I think you may have misspoken when you
16 mentioned the other FAA instead of the FAA here.

17 MR. FEIN: The Federal Arbitration Act. Excuse me.

18 The Federal Arbitration Act applies to the full
19 universe of any issue that could arise as an issue raised in
20 arbitration, for some violation of a duty to employees, it
21 could be torts, it could be violations of statutes, or
22 otherwise. The 7515 statute at issue here is very narrow.
23 It's a microscopic portion of all arbitration claims. It
24 applies only to sexual harassment and sexual retaliation
25 claims. Therefore, a decision on this particular 7515 claim

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1 does not implicate system-wide impact on the administration of
2 the Federal Arbitration Act.

3 And insofar as there is a worry about the uniform
4 interpretation of the Federal Arbitration Act, we know from
5 experience that that problem, if it exists, is readily remedied
6 by the United States Supreme Court repeatedly taking certiorari
7 jurisdiction to reverse decisions by state courts, oftentimes
8 state supreme courts, where the U.S. Supreme Court thought its
9 interpretation of the arbitration act was wrong. The Supreme
10 Court, unlike years ago, has room on its docket to hear these
11 kinds of cases. It's got 75 opinions as opposed to 175 years
12 ago. It doesn't even have all of its oral argument calendar
13 completed. So there isn't any threat to a uniform
14 interpretation of the Federal Arbitration Act when the Supreme
15 Court is there to correct any incorrect state interpretation.

16 The third element that comes into play here, we
17 believe the respondents have failed to satisfy, is altering the
18 federal-state balance that Congress has struck in this area.

19 Your Honor, Congress chose, in enacting Title VII of
20 the Civil Rights Act, not to preempt companion state claims,
21 local claims, protecting against sexual harassment and sexual
22 retaliation in the workplace. That's why we have state human
23 rights laws, including those in New York. Congress did not try
24 to preempt the field. Moreover, Congress did not try to
25 preempt the field of enforcing civil rights laws of this sort

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1 in state courts as it has in other areas. For example, patent
2 laws or antitrust laws can only be enforced in federal court.
3 So the decision that Congress made was that we will permit
4 victims of sexual harassment under state law to file their
5 claims in state court. We are not going to try to preempt that
6 decision. We are not going to disturb the choice of forum that
7 is ordinarily respected in federal-state relations.

8 What the respondents would have this Court do is upset
9 that congressional balance by permitting the defendants to say,
10 no, we want your state law claims to be adjudicated in a
11 federal court. What the respondents are asking you to do,
12 Judge Carter, is they want you ultimately to decide the state
13 law claims raised by Ms. Tantaros as opposed to having the
14 state court decide those particular questions.

15 There is nothing, your Honor, that the respondents
16 have argued that they could not have presented to Judge Cohen
17 before they raced to this particular court. And why they are
18 here is somewhat of a puzzle. They state in their papers they
19 are fully confident in Judge Cohen's ability to interpret the
20 Federal Arbitration Act, he is impartial, he can do justice,
21 yet at the same time they are running out of the courtroom and
22 they are here before you. It is probably true that if they
23 kept the case and responded to our claim in Judge Cohen's
24 courtroom, he would have already decided their defenses, which
25 they are entitled to present to him. So this is not a way to

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1 have an expeditious resolution of law in a proper fashion.

2 The second issue that you asked us to address was
3 whether or not there was so-called complete preemption. We
4 think the answer is clearly no for two reasons.

5 First of all, the underlying claims here, based upon
6 sexual harassment and sexual retaliation, are not prohibited by
7 federal law. Federal law under Title VII does not displace
8 state causes of action for similar comparable misbehavior in
9 the workplace. So there isn't any complete preemption under
10 the *Bankers* case, *Lincoln Mills* on 301 of the Labor Management
11 Relations Act. There the federal claims clearly ousted any
12 authority for states to have any claims whatsoever. That's not
13 true with regard to Title VII.

14 Secondly, with regard to the Federal Arbitration Act
15 itself, it acknowledges that it isn't trying to displace
16 decisions that states may have with regard to prohibiting
17 arbitration of certain claims, because it specifically uses the
18 term that arbitration is favored except upon such conditions in
19 law and in equity that would justify revocation of any
20 contract. So that discredits any idea that this was full
21 preemption, and, therefore, that would not transform what would
22 otherwise be a state law claim into a federal claim.

23 The last point you asked us to address was the *Pullman*
24 abstention doctrine. We think that you are correct, your
25 Honor, that the policy behind *Pullman* abstention applies

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1 completely here. The general rule is that, if there is an
2 ambiguous aspect of state law that could make moot the
3 resolution of a difficult federal question, then the federal
4 court should stay its hand and let the state tribunals decide
5 that issue first. That's what Justice Frankfurter lectured in
6 the *Pullman* case. And we think that's true here.

7 One of the issues that surely will be raised at some
8 point in this litigation is whether or not 7515 is retroactive,
9 whether it applies to contracts that were made before the
10 enactment of the law, and if so, one of the things you could
11 argue is violation of the obligation of contracts clause in the
12 United States Constitution or otherwise. But that issue is
13 something that the policy of *Pullman* dictates should be sent
14 back to Judge Cohen and he should decide that particular
15 question of retroactivity or not. It is not something that
16 this Court should reach out and decide at this particular time.

17 We think also that if this Court would sustain the
18 theory of the respondents -- namely, if any time there is the
19 possibility of a federal preemption defense, it's the burden on
20 the plaintiff to allege the non-inconsistency of the state
21 cause of action, with a possibility of a federal preemption --
22 it would transform removal into being the norm rather than the
23 extremely rare exception that Chief Justice Roberts identified
24 in *Gunn v. Minton*.

25 The last point I would like to make, your Honor, is

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1 with regard to the underlying policy of New York in enacting
2 7515 in trying to give greater protection to workplace women,
3 primarily, from sexual harassment and sexual retaliation. That
4 is a strong state law policy that ought to be implemented
5 through state court adjudications, and it would not be I think
6 consistent with the ordinary deference that the Supreme Court
7 and Chief Justice Roberts said should be given, specifically in
8 *Gunn*, to the state's ability to regulate workplace environment
9 concerning sexual harassment for having the federal court
10 somehow intercede.

11 That addresses the questions I believe you raised,
12 your Honor. I am eager to answer any questions you may have.

13 THE COURT: OK. Thank you.

14 I will hear from defendants.

15 MR. LAMPE: Thank you, your Honor.

16 I will also address the questions that the Court asked
17 us to focus on. I believe with respect to the *Gunn/Grable*
18 factors, your Honor asked us to focus on the first prong, the
19 "necessarily arising" prong. So I will start with that.

20 The *Gunn/Grable* doctrine is a doctrine that focuses on
21 whether there is federal question jurisdiction when the cause
22 of action arises under state law. So the fact that there is a
23 state law cause of action here is by no means an obstacle to
24 the *Gunn/Grable* doctrine applying. That's the very context in
25 which the doctrine is supposed to apply.

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1 The issue is whether or not there is an embedded
2 federal question that would give rise to the federal court
3 jurisdiction. And here plaintiff's sole cause of action is
4 brought under CPLR 7515. And that law, both parties have
5 recounted, specifies that, except where inconsistent with
6 federal law, certain arbitration clauses are unenforceable and
7 deemed void. Because there is a federal issue embedded on the
8 face of the state statute -- namely, whether or not the
9 prohibition of certain arbitration clauses is inconsistent with
10 federal law -- that cause of action gives rise to federal court
11 jurisdiction.

12 Now, I would urge the Court to focus in particular on
13 the *Rhode Island* case, the First Circuit case in *Rhode Island*.
14 Of all of the cases that any of the parties have cited, that is
15 the case that is most squarely on point. That dealt with the
16 statute that dealt with retroactive control dates having to do
17 with the lobster fishing industry, but the statute provided
18 that retroactive control dates were prohibited unless required
19 by federal law. And the First Circuit reasoned that the
20 plaintiff could not prevail in that case without showing that
21 the retroactive control dates were not required by federal law.

22 The First Circuit pointed out that there may very well
23 be a preemption defense, to use the court's term, lurking in
24 the wings. But the First Circuit said that "the federal
25 question here" -- I am quoting -- "the federal question here is

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1 inherent in the state law question itself because the state
2 statute expressly references federal law." That is exactly
3 what we have here. We have a state statute that expressly
4 references federal law and the plaintiff has to show that the
5 prohibition would not be inconsistent with federal law in order
6 to state the cause of action.

7 Let me turn to this issue of exceptions, and Mr. Fein
8 indicated that the defendant has the burden to prove that an
9 exception exists and it's not the plaintiff's burden. This is
10 an argument he raised in his reply brief and it's a very
11 important argument. There is very long-standing law in the
12 state of New York on this very issue, and it breaks in favor of
13 the Fox parties, not in favor of the plaintiff.

14 In New York law, I cite the *Rowell v. Janvrin* case,
15 which is 151 N.Y.60, New York Court of Appeals. This is the
16 seminal case. It's been cited many, many times over the years.
17 It draws a distinction between an exception on the one hand and
18 a proviso on the other hand. And an exception exempts
19 something absolutely from the operation of the statute, and it
20 is contained in the enacting clause of the statute. Exceptions
21 have to be proven by the plaintiff; it's the plaintiff's burden
22 to plead and prove an exception. A proviso is very different.
23 That is something that occurs later on in the statute. And if
24 a proviso avoids something in the statute, by way of an excuse,
25 provisos are the burden of the defendant. That's accurate.

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1 The *Meacham* case, which plaintiff cited, deals with the
2 proviso. But the law we are talking about 7515, the federal
3 question that is embedded is embedded in the enacting clause,
4 except where inconsistent with federal law. That's clearly,
5 under New York law, the burden of the plaintiff to plead and to
6 prove.

7 One other reference that I will give to the Court,
8 which is a treatise that summarizes all of the law in this
9 case, the New York treatise Carmody-Wait. So Carmody-Wait, 2d
10 27:21. So plaintiff cannot prove her cause of action under
11 7515 unless she proves that the prohibition is not inconsistent
12 with federal law. That's her burden and that is that embedded
13 federal question the plaintiff has to prove to prevail on her
14 cause of action which gives rise to the federal court
15 jurisdiction, in particular, satisfies the "necessarily
16 arising" factor in the *Gunn/Grable* test.

17 I will comment briefly on the fourth factor about the
18 balance between state and federal courts that counsel referred
19 to. We deal with all the other issues that counsel raised in
20 our brief. But the Fox parties, the defendants, are not asking
21 this Court to adjudicate the underlying issue of sexual
22 harassment. That is absolutely not what we have in mind. What
23 the defendants have in mind is asking the Court to decide
24 whether or not the plaintiff has satisfied her burden of
25 proving that the prohibition in 7515 is not inconsistent with

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1 federal law. If we were to prevail on that question, the
2 underlying dispute goes back to arbitration, which is what we
3 seek. So we are not asking the Court to adjudicate the
4 underlying sexual harassment claims.

5 So I would respectfully submit that the wrong balance
6 that Mr. Fein identified, or the division that he thought would
7 be an inappropriate encroachment in the state realm, he is
8 identifying the wrong division of authority. The division of
9 responsibility that's pertinent here is who decides the
10 question of whether or not the prohibition is inconsistent with
11 the FAA, not the underlying merits.

12 Counsel also referred to the fact that our argument is
13 at bottom a preemption defense. That is not accurate. There
14 may be a preemption defense lurking in the wings, to cite the
15 First Circuit, but preemption arises where there is a state
16 statute that is in conflict with a federal statute. That is
17 not what we have here. It is very clear on the face of 7515
18 that the New York Legislature did not want there to be a
19 conflict between its statute and federal law. It went so far
20 as to state at the very beginning in the enacting clause,
21 except where inconsistent with federal law. So the state is
22 going to regulate in areas that the federal law does not
23 control.

24 So, for example, if there is an employment agreement
25 in the transportation industry that it has an arbitration

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1 clause that will be prohibited, that is not something that is
2 controlled by federal law. The FAA carves out in Section 4
3 certain arbitration clauses that arise in employment agreements
4 in the transportation industry.

5 So our argument is that the state is scrupulously
6 careful to avoid a conflict with federal law. So our argument
7 that federal jurisdiction exists is certainly not based on the
8 fact that there is conflict. Our argument is based on the fact
9 that there is a statute that, by operation of the New York
10 Legislature, was drafted in a way that requires the resolution
11 on its face of a federal issue to determine whether the statute
12 is operable. That is exactly what we were dealing with in the
13 *Rhode Island* case that the First Circuit dealt with and that's
14 what creates the "arising from" jurisdiction.

15 Very briefly, your Honor, as to complete preemption,
16 your Honor asked us to comment on that. We agree with
17 plaintiff. There is no complete preemption. We do not assert
18 that. That does not fit here.

19 With respect to the *Pullman* abstention, this is an
20 abstention doctrine that relates to circumstances in which
21 there is a state statute that could be interpreted in such a
22 way to avoid a constitutional conflict, a conflict with the
23 federal Constitution. There is no constitutional issue here.
24 There is no Supremacy Clause issue here. The New York
25 Legislature was scrupulously careful to state that it is only

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1 operating in the space that is not inconsistent with federal
2 law. So on the face of 7515 there is no conflict of any kind
3 with federal law, and there certainly is no constitutional
4 collision here such that the *Pullman* abstention doctrine would
5 be applicable.

6 I am happy to address any questions, but otherwise we
7 would rest on what is laid out in our brief.

8 THE COURT: OK. Here is what I would like. I have
9 given each side seven minutes sort of in rebuttal. But before
10 I do that -- I will give each side a little bit more time -- I
11 would like the parties to also address the third and fourth
12 *Gunn/Grable* factors, the issues regarding whether or not this
13 is a substantial issue, and also the issue regarding whether or
14 not a federal forum may entertain this issue without disturbing
15 any congressionally approved balance of federal and state
16 judicial responsibilities.

17 So I will give counsel a few minutes to collect your
18 thoughts on that, and I would like to hear from you on that.
19 And I would like to find out if counsel have any views about
20 this potential issue regarding retroactivity and if that weighs
21 in on either of those elements three and four of *Gunn/Grable*.

22 So I will step back and I will give you six minutes
23 and I will be back.

24 (Recess)

25 THE COURT: I guess before I hear from counsel,

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1 another thought that I would like counsel to address.

2 In the state court action, would the plaintiff be
3 required to demonstrate retroactivity and a lack of waiver, and
4 if so, how does that play into this element of necessary?
5 Would those things also be necessary? And if that is true, and
6 if there are two necessary elements that the plaintiff must
7 establish that arise solely under state law, and one that is
8 necessary under federal law, how does that play?

9 So let me hear from plaintiff's counsel regarding
10 those issues, the issue that I just raised as well as the issue
11 that I raised right before the break.

12 You can sit there and use the mic.

13 MR. FEIN: I prefer standing. I appreciate the
14 courtesy.

15 Your Honor, let me address first the argument that the
16 statute 7515 saddles the plaintiff with this really almost
17 impossible burden of alleging, as part of the complaint under
18 7515, that the plaintiff has examined the entire corpus of
19 federal law -- all the regulations, all federal court
20 decisions, everything in the United States Code -- and alleges
21 that none of them are inconsistent with 7515's prohibition upon
22 mandatory arbitration of sexual harassment claims and
23 allegations. That's just not feasible. What lawyer can go
24 through the entire corpus of federal law? It makes sense, and
25 consistent with the ordinary rule, as the Supreme Court has

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1 repeatedly said, that the statutory interpretation, exceptions
2 outside the rule that's established by the law are to be pled
3 by the defendant, and proved by the defendant. Especially in a
4 case where, as here, this is a remedial statute, trying to help
5 women in their sexual harassment claims, and then they are
6 saddled with this huge burden that is almost impossible to
7 discharge.

8 THE COURT: Let me ask you this then. Why is it
9 outside of the law if it's specifically included in the text of
10 the statute? I understand the point that you were raising
11 earlier in your briefs to say that it's implicit in every state
12 statute that if it's inconsistent law, or preempted by federal
13 law, that this statute or this portion of it is no good. But
14 the fact that it's actually listed in the statute seems to me
15 that that should make a difference. The legislature is free to
16 include what it wants to in a statute and exclude what it wants
17 to, and the fact that it's included specifically in the statute
18 seems to me that that should have more resonance than if it
19 were not included in the statute.

20 MR. FEIN: Sometimes, your Honor, I think words that
21 are put in the statute may be redundant out of an excess of
22 caution. You have to read the statute in terms of its spirit
23 and goal and purpose. What you say is ordinarily maybe true,
24 but in the context in which this statute was enacted, in the
25 wake of serial epidemic workplace harassment of women, to

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1 impute to the legislature an intent other than stating what is
2 customarily true, that a state law cannot survive when it's
3 contradicted by federal law, can be treated as surplusage,
4 because the consequence of not doing that is simply absurd.
5 The plaintiff can't review every single federal law, every
6 federal decision ever made by this court and other courts,
7 every federal regulation that are millions, and say none of
8 them is inconsistent here.

9 So your point is a good one, ordinarily you do give
10 independent significance to every single word in the statute.
11 But we think, reading the purpose of the statute, and sometimes
12 legislatures aren't as precise as they might be, it doesn't
13 make any sense to give the interpretation that the respondents
14 have offered.

15 THE COURT: Let me ask you this then. Hypothetically,
16 if the statute, instead of talking about inconsistent with
17 federal law generally, if the statute said, we are not
18 inconsistent with CPLR -- I will just make up a number -- 5000,
19 we are not inconsistent with CPLR, let's make it 11000, what
20 would your argument be then? Wouldn't it be necessary for the
21 plaintiffs to -- and again, it gets hazy when we start talking
22 about whether this is an element that needs to be proven to a
23 jury, or is this something that just needs to be established in
24 a legal argument or some other way -- wouldn't the plaintiffs
25 be required to allege and show in order to prevail that this

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1 section was not inconsistent with CPLR Section 11000?

2 MR. FEIN: Well, I think you have a very strong
3 argument, your Honor, because in part that is at least a
4 manageable burden by a plaintiff. You have one statute; they
5 can examine the statute. That's not this case. The language
6 is all federal law, and you have to interpret the statute in
7 terms of -- and your common sense tells you -- what its
8 real-life application would be. One statute is a manageable
9 discharge of a burden, millions of them are not. And we
10 believe that's the difference between the hypothetical you
11 gave, when you have a specific provision, and the language of
12 this statute, which is everything under the sun under federal
13 law, including the United States Constitution, the obligation
14 of contracts clause, everything that you could think of.
15 That's the language.

16 THE COURT: I understand why you're making that
17 argument, but is this actually every federal law?

18 MR. FEIN: Read the text. Federal law is not a
19 synonym with Federal Arbitration Act.

20 THE COURT: But the statute refers specifically to
21 arbitration. So that is certainly going to limit the universe
22 that we are talking about here. You would agree that there is
23 nothing in this statute that seems to indicate that you would
24 need to go looking into fish and gaming statutes to figure out
25 whether or not they are inconsistent with this.

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1 MR. FEIN: One comes to mind, your Honor, that's not
2 arbitration. It may well be that thinking about the obligation
3 of contracts clause and applying the law retroactively could
4 impair obligation of contracts under some theory. You would
5 have to allege, no, this doesn't impair an obligation of the
6 contracts even though it applies retroactively. I haven't been
7 given enough time to see whether there are others, but that
8 immediately shows I don't believe it's limited to only the
9 Federal Arbitration Act. Because if that were true, why didn't
10 they just use Federal Arbitration Act? It's a simple idea.
11 It's only three words. It doesn't clutter up the statute. But
12 they didn't use Federal Arbitration Act.

13 I also think, your Honor, if you look at the *Latif*
14 case that the respondents celebrate, there is no indication in
15 *Latif* that your colleague interpreted 7515 in the way that's
16 being argued, that places the burden on the plaintiff to prove
17 the absence of any inconsistency with the FAA or otherwise.
18 The issue of 7515 came up in the context of a motion to compel
19 arbitration. There is no indication, for example, that the
20 defendant in *Latif* said, well, your Honor, you have to dismiss
21 the complaint because it doesn't allege as part of the claim
22 this is not inconsistent with X, Y and Z.

23 Now, there are somewhat cloudy facts that are
24 described in *Latif*.

25 THE COURT: Again, it seems to me, in terms of

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1 determining whether or not I have jurisdiction, I am not sure
2 how *Latif* is relevant to that at all. It seems to me in the
3 *Latif* case there was no issue about jurisdiction, and there was
4 no issue about whether or not the judge should decide that
5 issue regarding 7515. Here, the issue that has been raised in
6 the motion to remand is the issue that I don't have
7 jurisdiction to even get to that issue of whether or not 7515
8 applies in light of the FAA. But let me hear from you on that.

9 MR. FEIN: You're right; and on that score, we are not
10 arguing otherwise. We are just suggesting, and I don't want to
11 overstate the point, that *Latif* could have gone off on a
12 different ground if the judge said, you know, just interpreting
13 7515 on its face, the plaintiff hasn't alleged as part of the
14 7515 claim that it's not inconsistent with the Federal
15 Arbitration Act and everything else under the sun.

16 Now, the description in the facts of *Latif* aren't so
17 comprehensive, I am sure, on that score. But that would be an
18 alternate way in which you could dismiss a 7515 claim. If it
19 is true that you have to make these allegations of not
20 inconsistent with anything else, if it's not in the complaint,
21 then you make a 12(b)(6) motion.

22 THE COURT: Why would it be necessary to make the
23 allegation if it's embedded within the statute?

24 MR. FEIN: Because if you don't allege it in the
25 complaint and it's in the statute, you dismiss it for failure

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1 to state a claim.

2 THE COURT: Well, I am saying, in terms of in a
3 removal context, if you're placing the complaint on a statute
4 and the statute has as a part of the statute that language, why
5 would it be necessary for the plaintiff to have the actual
6 language -- I am not sure I am understanding -- to reallege the
7 language of the statute?

8 MR. FEIN: I think I am inartful here. What I am
9 saying is that, for example, before Judge Cohen, if the
10 respondents believed that the complaint under 7515 was
11 defective, because their argument is an essential element of
12 the cause of action is you have to allege this is not
13 inconsistent with federal law; they claim that's an essential
14 element. So if you don't allege in the complaint an essential
15 element of a claim, you are going to get dismissed for failure
16 to state a claim, whether it's under state or federal court.
17 They didn't go to Judge Cohen and say, you need to dismiss this
18 because they didn't allege in the complaint -- and I drafted it
19 and I know I didn't allege -- this is not inconsistent with any
20 federal law whatsoever. And that's how something like this
21 would be treated if it had to be part of the plaintiff's
22 complaint as opposed to a defense.

23 I want to address a couple of other issues, your
24 Honor, before I get to retroactivity and waiver. And that is,
25 there is a suggestion that there is no way that the respondents

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1 would ever ask you to interpret the sexual harassment claims
2 that arise under state and local law concerning Ms. Tantaros.
3 But the fact is, suppose you don't grant remand and you take
4 the case, and you interpret 7515 to be consistent with the
5 Federal Arbitration Act, because it's really another
6 manifestation of procedural or substantive unconscionability
7 that could be used to revoke any contract in law and equity,
8 and therefore it's valid. If you found that it's valid, then
9 you are going to have to address the underlying claim, which
10 would be sexual harassment, the retaliation claims, that are
11 the reason for trying to get this into court as opposed to
12 arbitration. The knot doesn't phase out of the case, because
13 if you kept the case you are going to have to address those
14 issues.

15 With regard to retroactivity and waiver, I believe
16 that those are novel questions of state law that would be
17 raised. And the *Pullman* doctrine here, I believe, your Honor,
18 correctly points out, if you have novel questions of state law
19 that could avoid a decision -- they argue it's not a matter of
20 constitutional law -- but it avoids a decision of a federal
21 question, which is obviously interpreting the Federal
22 Arbitration Act, then the federal court should stay its hand.
23 Let's see if the state court can resolve this without even
24 getting to the federal question.

25 Before I close I want to underscore the fact that this

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1 is a situation where the state courts have shown from the
2 beginning, when Congress was given this authority, they can
3 resolve interpretations of the Federal Arbitration Act. We are
4 talking about how the state statute ought to be interpreted,
5 should it require the plaintiff to make these allegations? Why
6 is your Honor deciding this? It's a novel question under state
7 law. Why isn't that an issue for Judge Cohen? The respondents
8 say he's a great judge, he's competent, he's impartial. Why
9 are you deciding that issue, especially if it is a hard one?
10 And Congress specifically decided it wasn't going to take these
11 kinds of cases away from state courts, it didn't try to make
12 federal jurisdiction exclusive, which I think all these issues
13 that we are arguing underscores why this case should be back in
14 Judge Cohen's courtroom, where he will apply the same law that
15 this Court would if it kept it.

16 THE COURT: OK. Thank you.

17 Let me hear from defendants.

18 MR. LAMPE: Thank you, your Honor.

19 Let me address, first of all, what I will call the
20 parade of horribles argument that Mr. Fein was addressing about
21 the fact that there would be this terribly unmanageable
22 circumstance if the plaintiff had to negate inconsistency with
23 the full spectrum of federal laws.

24 We respectfully disagree with that. It is very clear
25 what federal law is at issue here. It's clear from the face of

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1 7515 which is a statute that purports to bar certain types of
2 arbitration agreements. It's very clear what statute is
3 implicated here, which is the FAA. If there is any doubt at
4 all, the legislative history confirms the point. And we cite
5 the legislative history in our brief, in footnote 2, page 8.
6 The legislative history shows that the concern here is the
7 inconsistency with federal law related specifically to the FAA.

8 Now, I will also point out once again the *Rhode Island*
9 case. That was a case in which the embedded federal issue was
10 whether or not these retroactive control duties were -- they
11 were prohibited unless they were required by federal law. That
12 statute did not specify which particular federal law, but the
13 First Circuit understood full well what particular federal law
14 was at issue there. So that is, respectfully, not anything
15 that should weigh on the Court's decision-making with respect
16 to the removal question.

17 With respect to the third and fourth prong,
18 substantiality of interests, we have, your Honor, in recent
19 years a clash between, on the one hand, the FAA and federal
20 courts that are interpreting the FAA, and on the other hand
21 state legislatures and state courts that are seeking to chip
22 away at the protections of the FAA, and this is manifested by a
23 long line of cases, including Supreme Court cases that are
24 pushing back on the states that are encroaching on the
25 protections available under the FAA. Specific to this

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1 particular context, we also have now a proliferation of state
2 statutes very similar to 7515. We cited several of those state
3 statutes in footnote 3 on page 9.

4 So there is a very clear federal interest in having
5 this issue resolved. The federal courts have time and again
6 emphasized the strong federal interest in the protections of
7 the FAA and the uniform and accurate interpretation of the FAA
8 to protect arbitration agreements from state law encroachment.
9 The substantial interest is very clear.

10 With respect to respecting the division between state
11 and federal courts, I repeat my point earlier, your Honor.
12 This is not a case or an argument that would require this Court
13 to try the underlying sexual harassment claims in this case,
14 nor would the Court, accepting jurisdiction in this case,
15 create a flood of cases with underlying sexual harassment
16 claims being tried in federal court. The sole cause of action
17 in the plaintiff's complaint is 7515. That's the complaint
18 that we removed to federal court. 7515 does not require
19 examination or adjudication of the underlying sexual harassment
20 allegations. That's a state law issue.

21 So there is no reason to think that the federal court
22 will be flooded with state sexual harassment claims that belong
23 in the state court. Rather, what we are asking this Court to
24 weigh in on is an issue of peculiarly federal interest, which
25 is whether or not a purported state prohibition would be

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1 inconsistent with the FAA. That is an issue that federal
2 courts decide all the time. And the state is very clear in the
3 statute that it respects the fact that the federal courts
4 decide that all the time, because in the statute the New York
5 Legislature specifically deferred to the federal body of law by
6 saying, except as inconsistent with federal law. So the state
7 is inviting in federal court scrutiny of an interpretation of a
8 federal statute. So we would respectfully submit that there is
9 no problem with disrupting the balance between federal and
10 state courts and what they respectively handle.

11 With respect to the issue that your Honor raised about
12 the fact that the cause of action may involve retroactivity
13 issues, and they involve also waiver issues, and how does that
14 impact the necessarily arising doctrine. We respectfully
15 submit that those issues do not affect the federal court
16 jurisdiction issue at all. In fact, the issue that your Honor
17 raises was once again decided and addressed in the *Rhode Island*
18 case. In the *Rhode Island* case, the First Circuit discussed
19 the fact that the plaintiff had raised an argument about the
20 fact that the cause of action had arisen under state law, and
21 the First Circuit said, and I quote, this argument sets up a
22 false dichotomy. I continue to quote, It presumes that claims
23 cannot simultaneously arise under both federal and state law.
24 That premise is faulty. Federal jurisdiction extends to a case
25 arising under federal law regardless of whether the cause of

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1 action itself has a genesis in state law.

2 In that *Rhode Island* case, the First Circuit looked to
3 see whether there is a jurisdictional hook, whether there is an
4 aspect of the cause of action that necessarily raised a federal
5 question, and the First Circuit found that that was in fact the
6 case because a federal question was embedded on the face of the
7 statute.

8 So the fact that there are also state ingredients to
9 the cause of action does not divest the Court of jurisdiction.
10 And to the extent the Court is concerned about having to decide
11 the retroactivity issue, this is where *Latif* really is
12 important. The Court does not need to decide the retroactivity
13 issue. Judge Cote did not decide the retroactivity issue.
14 This Court can very quickly resolve this issue, and resolve the
15 complaint and the viability of the only cause of action
16 asserted in the complaint, by determining that the purported
17 prohibition would in fact be inconsistent with federal law. By
18 answering the question that the state legislature invited this
19 Court to answer, that answer would be dispositive of the
20 complaint with its one cause of action 7515, and the matter
21 would then go back to arbitration for adjudication of the
22 underlying sexual harassment allegations.

23 I believe that's all I have, your Honor. If there are
24 any further questions, I am happy to answer them.

25 THE COURT: I have a question regarding the fourth

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1 *Gunn/Grable* factor. In the *Grable* case, the full language
2 regarding the congressional judgment about the sound division
3 is: The federal issue will ultimately qualify for a federal
4 quorum only if federal jurisdiction is consistent with
5 congressional judgment about the sound division of labor
6 between state and federal courts governing the application of
7 Section 1331. So it is linked to Section 1331 federal question
8 jurisdiction.

9 How does the fact that the FAA in and of itself does
10 not create federal jurisdiction, how does that weigh into that
11 analysis?

12 MR. LAMPE: Well, deciding that the fourth prong that
13 favors removal is satisfied would not divest state courts of
14 deciding this issue. So this issue of inconsistency with the
15 FAA, or whether the FAA prohibits certain encroachments on
16 arbitration agreements, is an issue that, as Mr. Fein pointed
17 out, can be decided by state courts and can be decided by
18 federal courts. And those issues are in fact decided by state
19 and federal courts.

20 This case is unusual, though, your Honor, because this
21 case involves a state statute which is the premise of the only
22 cause of action in the case that specifically embeds in its
23 text a federal question. That's what makes this case different
24 from many of the other circumstances that could arise. There
25 is not a lot of statutes like that. And so for the federal

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1 court to decide, and basically to accept the state
2 legislature's invitation to decide this issue -- an issue that
3 federal courts do routinely decide -- would not upset the
4 balance between state and federal courts in interpreting
5 whether or not the FAA prohibits certain encroachments or
6 prohibitions on an arbitration clause.

7 THE COURT: Why do you say that the state legislature
8 is inviting a federal court as opposed to a state court, or if
9 they have druthers one way or the other about who decides that,
10 why do you say that?

11 MR. LAMPE: Because it's the reason in the First
12 Circuit, when the state legislature chooses to embed a federal
13 question in enacting a clause of a statute.

14 By the way, your Honor, that clause, the "unless
15 inconsistent with federal law," is in this short statute twice.
16 When a legislature embeds that federal question into a statute,
17 it is creating federal court jurisdiction, federal question
18 jurisdiction, because the cause of action arises under federal
19 law by virtue of that embedding of the federal question. The
20 state could have chosen not to embed the federal question.

21 THE COURT: But I think that that *Rhode Island* case
22 was decided, I believe, in 2009, and that case was decided
23 before the *Gunn* decision in which Judge Roberts sort of
24 clarified the fact that sometimes courts -- I think in that
25 case the Texas state supreme court -- can conflate the issues

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1 of necessary and that fourth prong. It seems to me that the
2 First Circuit, while they have a very well-reasoned opinion, I
3 am not sure that they clearly delineated the differences
4 between that first prong and that fourth prong. Can you tell
5 me more about that?

6 MR. LAMPE: Well, the first prong is whether or not
7 the cause of action could be decided without deciding the
8 federal question, and the First Circuit found that it could not
9 be; it had to be decided. With respect to the fourth prong,
10 the First Circuit talked about the fact that the issue was one
11 that there was a strong federal interest in and it was not
12 likely to arise repeatedly. I believe the First Circuit
13 discussed the fact that the floodgates will not be opened, the
14 federal courts will not be inundated with these types of
15 claims.

16 I would submit that the same logic applies here. We
17 have the *Latif* case. Basically, this case challenges the *Latif*
18 case. We would ask your Honor to adopt the reasoning of the
19 *Latif* case on the issue of inconsistency. It is hard to
20 imagine that there will be a flood of additional challenges
21 once this Court has twice decided this issue of whether or not
22 7515 is inconsistent with the FAA. At some point one of these
23 cases may go to the Second Circuit and that closes the door
24 completely; the issue then will be decided.

25 THE COURT: But until then why would that close the

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1 floodgates?

2 MR. LAMPE: I think just practically speaking
3 plaintiffs are unlikely to continue to challenge this court's
4 ruling that's has been ruled on twice, or maybe a district
5 court in the Second Circuit, to repeatedly seek to get a
6 different judge from the same court to issue a different
7 ruling. I think as a practical matter that's not likely to
8 happen.

9 THE COURT: Well, again, without accusing either side
10 of doing any sort of forum shopping, my sense is that the
11 plaintiffs are not trying to get a different federal judge to
12 rule on that issue; the plaintiffs want this case back in state
13 court, and they want a state court judge to rule on this issue.

14 MR. LAMPE: Well, I understand that. Mr. Fein has
15 talked about how Justice Cohen is a good judge, and we
16 certainly don't disagree with that. I respectfully submit
17 that's not relevant to the *Gunn/Grable* question. The issue is
18 whether or not federal jurisdiction exists. The issue does not
19 require us to show some infirmity with this judge and his legal
20 abilities or anything like that. So the fact that the state
21 court judge could decide this, it's consistent with the fact
22 that this issue can be in state court, but it could also be in
23 federal court, and where the legislature chooses to embed the
24 federal question on the face of the statute, that creates
25 federal court jurisdiction where it would otherwise not exist.

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1 THE COURT: Anything else from plaintiffs?

2 MR. FEIN: Yes, your Honor. You have been most
3 generous with your time. I will be short.

4 Your Honor, I think your questions hit the nail on the
5 head. One, there is nothing in the statutory language that
6 suggests the legislature wanted 7515 claims to be ousted from
7 state courts. It would be odd for a state legislature to be
8 distrustful of its own courts.

9 I do believe that you're correct in examining this
10 federal-state balance, as the fourth criteria is one that I
11 believe the respondents cannot hurdle. What is the
12 federal-state balance that Congress established? Congress
13 decided we are not going to take jurisdiction over sexual
14 harassment claims away from the state courts; we are not going
15 to preempt the field. We are permitting states to augment
16 Title VII of the Civil Rights Act even with regard to
17 arbitration. In passing the Federal Arbitration Act, Congress
18 did not say there is never any cases ever where a state law
19 cannot supersede and invalidate an arbitration provision. It's
20 customary that we will uphold it, but then it has a
21 circumstance, when in law and equity a provision would be
22 revocable as a matter of contract law, then the FAA gives way.
23 And Congress struck the balance to permit the state courts to
24 adjudicate these kinds of cases.

25 The respondents would upset the balance that Congress

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1 established. Congress could create, as you well know,
2 exclusive federal jurisdiction if they wanted all these cases
3 to be in the federal court. They chose specifically not to do
4 so, and we believe if this Court accepted a removal, it would
5 be disturbing that balance struck by Congress.

6 Thank you.

7 THE COURT: OK. Anything else from defendants?

8 MR. LAMPE: No, your Honor.

9 THE COURT: OK. Hold on a second.

10 OK. Thank you very much. I will continue to think
11 about this and hopefully I will get a decision out soon.

12 We are adjourned. Thank you.

13 (Adjourned)